SULAIMAN AHMAD & ORS v. JEMAIN MOHAMED & ORS

HIGH COURT MALAYA, JOHOR BAHRU
AHMAD KAMAL MD SHAHID J
[CIVIL SUIT NO: JA-22NCVC-97-04-2017]
19 JUNE 2020

LAND LAW: *Transfer – Validity – Locus standi – Challenge against validity of transfer of land to company – Muslim estates – Action by beneficiaries of estates against company – Whether beneficiaries had necessary locus standi to bring action – Whether letter of administration and sijil faraid must be obtained before beneficiaries could commence action against company*

LAND LAW: *Transfer – Fraud – Challenge against validity of transfer of land to company – Action by beneficiaries of estates against company – Action for protection/preservation order by way of re-transfer of land to original owners – Whether beneficiaries had necessary locus standi to bring action – Whether transfer and registration of land in name of company acquired through fraud, forgery and/or void instrument – Whether company subsequent/immediate purchaser – Whether company bona fide purchaser – Whether company enjoyed indefeasibility of title – National Land Code, s. 340(2)(a), (b) or (c)*

The plaintiffs were the beneficiaries of the estates of two deceased persons, Jemain Mohamed ('Jemain') and Kechot Mohamed ('Kechot'), who each held half undivided shares in a land which had been transferred and registered in the name of the third defendant. The plaintiffs filed a suit at the High Court against the defendants to, *inter alia*, challenge the validity of the transfer and seek protection/preservation order and declaration as to the status of the transfer of the land to the third defendant ('first suit'). Upon an application by the third defendant, the first suit was struck out on the reason that the plaintiffs lacked *locus standi* due to the failure to obtain the letter of administration ('LA') or the sijil *faraid* for the estates, before commencing the first suit. Dissatisfied with the said decision, the plaintiffs appealed to the Court of Appeal. The Court of Appeal, with the consent of the third defendant, allowed the plaintiffs to file a fresh suit upon obtaining a sijil *faraid* ('COA decision'). Following the obtainment of the sijil *faraid*, the plaintiffs filed the present suit ('second suit'), seeking the same orders sought in the first suit, on the grounds that (i) the transfer and registration of the land in the name of the third defendant was acquired through fraud or forgery and/or a void instrument by the first, second and/or third defendants; (ii) the High Court *ex parte* order for sale which granted the sale of half share of the land belonging to Kechot ('*ex parte* order'), held by one deceased Zabidah as trust, was null and void and ought to be set aside *ex debitio justitae* as it was obtained in the absence or knowledge of the plaintiffs; (iii) the title to the land was not indefeasible as there were special circumstances arising from the

nature of the pleaded case and further, the COA decision disposed of the *locus standi* point of law raised by the third defendant; and (iv) the plaintiffs were not claiming a share or any proprietary interest in the assets of the estate nor seeking to name themselves on the title; what the plaintiffs sought was (a) a declaratory relief on the status of transfer on grounds of fraud/forgery/void instrument; and (b) a protection/preservation order by way of re-transfer to their original owners. Therefore, they had the *locus standi* to commence the second suit as an exception to the general principle apart from the clear COA decision. In response, the third defendant argued that (i) it was a *bona fide* purchaser for value without notice and the entire sale and purchase transaction was valid and lawful at all material times. Therefore, the third defendant had acquired indefeasibility of the title to the land; (ii) the plaintiffs had no *locus standi* and no cause of action to commence the second suit without obtaining the LA for Jemain even though they had ample time to do so; (iii) the plaintiffs alleged that they were Jemain's beneficiaries but they failed to produce any evidence such as the death certificate or official record proving the death of Jemain; (iv) a letter from the National Registration Department ('NRD') showed that there was no record pertaining to the death of Jemain; and (v) the *ex parte* order was valid, lawful and binding on all relevant parties as there was no appeal against the order. The issues that arose for adjudication were: (i) whether the LA was required for the plaintiffs to seek declaratory and consequential reliefs prayed for; (ii) whether the titled acquired, and now registered in the third defendant's name, under the land could be defeated under s. 340(2)(a), (b) or (c) of the National Land Code ('NLC') on account of fraud, forgery or void instrument; (iii) whether the *ex parte* order could be set aside by this court; (iv) whether the first defendant was the registered owner of half the share in the land; and (v) whether the third defendant was a *bona fide* purchaser for value without notice under s. 340(3) of the NLC.

Held (allowing claim with costs):

(1) The COA decision, which overrode and reviewed the first suit, could not be ignored. The terms of the COA decision were precise, clear and unambiguous, in that, it allowed the filing of the second suit upon obtaining the sijil *faraid*. Since it involved a Muslim estate, the sijil *faraid* was the best evidence and clothed the plaintiffs, as beneficiaries, with the legal capacity to bring the second suit. The sijil *faraid* clearly stated the names of the deceased, their time of death, the rightful beneficiaries and their entitlements. Furthermore, not only was the COA decision unanimous but the terms of the order was also consented to and approved by the third defendant. The third defendant was bound by the COA decision and could not now resile from the terms of the COA decision without appealing or setting aside the COA decision. The

plaintiffs had the *locus standi* to commence the second suit to protect and preserve their interest in the land. The issue of lack of *locus standi* due to the absence of the LA, as raised by the third defendant, could not be raised or re-opened again since it had been decided upon in favour of the plaintiffs in the first suit, affirmed by the COA decision and leave to appeal to the Federal Court had been rejected. (paras 38-43, 49 & 50)

(2) The third defendant was not the first registered owner of the land but the immediate purchaser of the land. The third defendant had acquired the title through fraud and/or forgery of the first and second defendants and/or by means of a void instrument of transfer on grounds of forgery. The deceased persons, who were the original registered owners of the land, could not have executed the sale and purchase agreement in 2013 and the instrument of transfer, nor could they have applied for the *ex parte* order as they were long dead before 2013. Furthermore, the first defendant had not only admitted that he was not the original registered owner of the land but he also admitted the plaintiffs' statement of claim in regards to the particulars of fraud and forgery relating to him in executing the sale and purchase agreement in 2013 and the instrument of transaction as co-vendor without the lawful authority to do so. This was a judicial admission and could be treated as the highest form of admission. Indefeasibility of title does not apply as a result of, at least one of the three vitiating factors laid out in s. 340(2)(a), (b) or (c) of the NLC. Based on the testimony, contemporaneous documents and inherent probabilities, the land registered in the third defendant's name was clearly defeasible and liable to be set aside under s. 340(2)(b) of the NLC for fraud, forgery and/or void instrument. (paras 56, 59, 60, 68 & 72)

(3) The plaintiff succeeded in proving that the *ex parte* order was obtained through fraud and/or forgery by the first/second defendants. There were no NRD records for the name of Zabidah and this was confirmed by the testimonies of the NRD witnesses. The NRD records also showed the IC number furnished at the request of a solicitor and used for the sale and/or transfer documents did not refer to Zabidah but to a dead person. This IC number had been used in obtaining the *ex parte* order as well as in the sale and transfer documents when the applicant for the *ex parte* order was also believed to be dead at the material time. The third defendant need not be a party or privy to the forgery where forgery existed. The *ex parte* order was a nullity *ab initio* and must be set aside as it was fraudulently obtained by the first and second defendant for the trickster applicant pretending to be the real Zabidah. (paras 79-82 & 86)

(4) The first defendant was not the registered owner of half the share of the land, based on (i) the testimony and admission of the first defendant who happened to be the co-vendor in this case; (ii) testimonies of the NRD witnesses; (iii) contemporaneous documents that the signature of Jemain and Zabidah who had passed away had been forged; and (iv) the first defendant had admitted to the signing of his signature although he was not the registered owner but the grandson carrying a similar name. (para 94)

(5) The plaintiff had proved, on the balance of probabilities, its case against the first, second and third defendants. Even assuming that the third defendant was an innocent party, it could not rely or invoke the doctrine of a *bona fide* purchaser for value since the third defendant was the immediate purchaser and not the subsequent purchaser. (paras 96 & 103)

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***
Al Rashidy Kassim & Ors v. Rosman Roslan [2007] 3 CLJ 361 FC ***(refd)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Chor Phaik Har v. Farlim Properties Sdn Bhd [1997] 4 CLJ 393 FC ***(refd)***
Dato' Ramesh Rajaratnam v. Datin Zaleha Abd Rahman & Ors [2014] 5 CLJ 669 CA ***(refd)***
Deraman & Ors v. Mek Yam [1976] 1 LNS 20 FC ***(refd)***
EU Finance Bhd v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***
Hj Ali Omar & Anor v. Lim Kian Lee & Ors [2002] 8 CLJ 443 HC ***(refd)***
Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(foll)***
Jumaaton Awang & Satu Lagi lwn. Raja Hizaruddin Nong Chik [2004] 1 CLJ (Sya) 100 ***(refd)***
Ketua Pengarah Jabatan Kerja Raya v. Strongkota Development Sdn Bhd & Another Appeal [2016] 3 CLJ 741 CA ***(refd)***
Mohd Salim Said & Ors v. Tang Pheng Kee & Anor And Another Appeal [2014] 6 CLJ 485 CA ***(refd)***
Ng Thau Shing v. George Justine & Other Cases [2005] 6 CLJ 80 HC ***(refd)***
Ooi Jim & Anor v. Ai Eit & Ors [1974] 1 LNS 108 FC ***(refd)***
Pilecon Engineering Bhd v. Malayan Banking Bhd & Ors [2011] 1 LNS 1492 HC ***(refd)***
Poraviappan Arunasalam Pillay (Sebagai Pentadbir Harta Pesaka Nadarajah Sithambaram Pillai) v. Periasamy Sithambaram Pillai & Anor [2015] 6 CLJ 857 FC ***(refd)***
Raub Australian Gold Mining Sdn Bhd v. MKini Dotcom Sdn Bhd & Ors [2018] 1 LNS 62 CA ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(foll)***
Yam Kong Seng & Anor v. Yee Weng Kai [2014] 6 CLJ 285 FC ***(foll)***

Legislation referred to:
National Land Code, ss. 89, 340(1), (2)(a), (b), (c), (3)

For the plaintiffs - T Gunaseelan & M Alphone; M/s Alphone & Co
For the 1st defendant - Lum Chee Seng; M/s Lum Chee Seng & Assocs
For the 2nd defendant - Not present in court
For the 3rd defendant - Wong Kim Fatt, Lawrence Chiong Sheng Fan, Wong Boon Chong & Ungku Ahmad Hafis Ungku Fathil; M/s Chiong & Partners

Reported by Najib Tamby

JUDGMENT

Ahmad Kamal Md Shahid J:

Background Facts

[1] The plaintiffs are the beneficiaries of the estates of their grandfathers namely Jemain bin Mohamed and Kechot bin Mohamed pursuant to a 'sijil perakuan faraid' dated 18 April 2017 issued by Syariah High Court.

[2] Both of these deceased held 1/2 undivided share each in a land known as Lot 59, GM 1975 (previously held under GM 922) Mukim Pulai, Daerah Johor Bahru ("land").

[3] The said land has been transferred and registered in the name of the third defendant, Teguh Asiamas Sdn Bhd with effect from 18 May 2014.

[4] On 8 January 2015, the original 24 plaintiffs (now 38 plaintiffs) had filed their first Civil Suit No: 22NCVC-4-01-2015 at Johor Bahru High Court ("first civil suit") against the defendants amongst others to challenge the validity of the transfer and sought the relief of protection/preservation order and declaration as to the status of the transfer of the said land to the third defendant.

[5] However the first civil suit was then struck out by a High Court order dated 9 December 2015 on the reason that the original 24 plaintiffs (now 38 plaintiffs) were lacking in *locus standi* due to the plaintiffs' failure to obtain letter of administration ('LA') or the 'sijil *faraid*' before commencing the said first civil suit. The High Court order was a result of the third defendant's application to strike out the first civil suit under O. 18 r. 19 Rules of Court 2012 ("ROC 2012").

[6] Aggrieved with the decision of the High Court, the 24 plaintiffs (now 38 plaintiffs) appealed to the Court of Appeal.

[7] The Court of Appeal by a unanimous decision on 2 August 2016 and with the consent of the third defendant had allowed the 24 plaintiffs (now 38 plaintiffs) to file a fresh suit upon obtaining the 'sijil *faraid*' for both estates of the deceased.

[8] The order of the Court of Appeal dated 2 August 2016 ("COA decision") reads as follows:

Alizatul Khair bt Osman Khairuddin, HMR
Nallini Pathmanathan, HMR
Zabariah Binti Mohd Yusof, HMR

2 OGOS 2016 Dalam Mahkamah Terbuka

Perintah

RAYUAN INI ditetapkan untuk perbicaraan pada hari ini dalam kehadiran T. Gunaseelan dan M. Alphone peguambela bagi Perayu-Perayu yang juga menyebut bagi pihak Responden Pertama; Datuk Dr. Wong Kim Fatt; Dato' Lawrence Chiong Sheng Fah serta Wong Boon Chong peguambela bagi Responden Ketiga yang juga menyebut bagi peguamcara Responden Keempat dan Kelima; dan George Neo bersama Phang Ja Mein penguambela bagi Responden Kedua, DAN SETELAH MEMBACA Rekod Rayuan dan kesemuanya yang difailkan di sini DAN SETELAH MENDENGAR hujahan peguambela tersebut, MAKA ADALAH DIPERINTAHKAN SECARA SEBULAT SUARA:

(a) *Dengan persetujuan Perayu-Perayu dan Responden-Responden* Perintah Mahkamah Tinggi Johor Bahru bertarikh 09.12.2015 diubah setakat bahawa Perayu-Perayu diberi kebebasan *untuk memfailkan satu tindakan baru selepas memperolehi 'Sijil Faraid' dalam tempoh Sembilan (9) bulan dari tarikh Perintah ini berkenaan dengan harta pusaka Jemain bin Mohamed dan harta pusaka Kechot bin Mohamed*;

(b) Responden Ketiga bersetuju tidak akan membuat permohonan mengeluarkan Kaveat Pendaftar yang terdapat atas Geran Tanah yang dikenali sebagai GM 1975 Lot 95, Mukim Pulai, District of Johor Bahru, sehingga selepas tamat sembilan (9) bulan dari tarikh Perintah ini;

(c) Tiada Perintah terhadap kos; dan

(d) Deposit Rayuan dikembalikan kepada Perayu-Perayu.

(emphasis added)

[9] The plaintiffs after obtained the 'sijil *faraid*' for both estate of the deceased had filed this current Suit No: JA-22NCVC-97-04-2017 (second suit) pursuant to the said order.

[10] In this present suit, the plaintiff sought amongst others for a declaration as to the status of the transfer of the said land to the third defendant to be declared as null and void on account that the title of the said land was acquired through fraud or forgery by the first, second and/or the third defendants and/or through a void instrument. Further, the plaintiff also sought for consequential reliefs particularly for a protection/preservation

order by way of a re-transfer of the said land to the original registered owners and for other consequential orders upon establishing fraud/forgery and/or void instrument.

The Plaintiffs' Case

[11] It is the plaintiffs' contentions that since the instrument of transfer in Form 14A was not executed by the real registered owners, thus the transfer and registration of the said land in the name of the third defendant was acquired through fraud or forgery and/or a void instrument by the first and/or the second and/or the third defendants. Hence, the plaintiffs submitted that the title is subject to impeachment and is defeasible under s. 340(2)(a) or (b) of the National Land Code ("NLC").

[12] It is the plaintiffs' contention that they only became aware of the existence of the said land left behind by their grandfathers in June 2014 and proceeded to enter caveat on the said land before filing the first civil suit at the Johor Bahru High Court.

[13] It is the plaintiffs' contentions that the Johor Bahru High Court *ex parte* order for sale dated 24 October 2013 under Originating Summons No. 24NCVC-271-10-2013 which granted the sale of the remaining half share belonging to the deceased Kechot bin Mohamed and held by Zabidah binti Sembob as trust to be null and void. Thus, the plaintiffs contended that the said order sought to be set aside *ex debitio justitiae* on account of fraud/forgery by the first and second defendants which was obtained in the absence or knowledge of the plaintiff as being an *ex parte* order.

[14] The plaintiffs contended that the applicant named in the said order for sale dated 24 October 2013 namely Zabidah binti Sembob was dead at the material time of the filing of the said application for sale. Further, the plaintiffs also contended that Zabidah binti Sembob was dead at that material time when the sale and purchase agreement and the instrument of transfer (Form 14A) was said to be executed on 1 October 2013.

[15] The plaintiffs contended that the title to the said land is not indefeasible as there is "special circumstances" arising from the nature of the pleaded case and further, there is a sanction by the COA which then disposed of the "*locus standi*" point of law raised by the third defendant. The 2016 COA decision clearly allows the filing of this fresh suit (second suit) upon the plaintiffs obtaining the 'sijil *faraid*' for both of their deceased grandfathers' estate' from the Syariah Court which was duly complied.

[16] The plaintiffs, as beneficiaries further contended that they are not claiming a share or any proprietary interest in the assets of the estates of their deceased grandfathers nor they are seeking to name themselves on the title at this stage. However, what the plaintiffs truly seeking amongst others, a

declaratory relief on the status of transfer on grounds of fraud/forgery/void instrument and a protection/preservation order by way of a re-transfer to their original owners which is their deceased grandfathers and not to themselves. Therefore, the plaintiffs contended that they have the l*ocus standi* to commence this action as an exception to the general principle apart from the clear order of the COA decision granted in 2016.

The Third Defendant's Case

[17] It is the third defendant's contentions that the third defendant is a *bona fide* purchaser for value without notice and the entire sale and purchase transaction is valid and lawful at all material times. Therefore, the third defendant had acquired indefeasibility of the title to the said land and deny any allegations of fraud, forgery and/or negligent.

[18] The third defendant contended that the plaintiffs have no *locus standi* and no cause of action to commence this suit (second suit) against the third defendant as well as the other defendants without obtaining the LA of the deceased Jemain bin Mohamed even though they have ample time to do so.

[19] The third defendant further contended that the plaintiffs alleged that they are the deceased's (Jemain bin Mohamed) beneficiaries but failed to produce any evidence such as death certificate or official record proving the death of the said Jemain bin Mohamed.

[20] Furthermore, the letter from the National Registration Department (NRD) dated 8 August 2014 clearly shows that there is no record pertaining to the death of the said Jemain bin Mohamed. Hence, the third defendant contended that the death of the said Jemain bin Mohamed who was the original owner is unknown and not proven.

[21] In respect of the other half share in the said land, the third defendant contended that the sale of that half share (ie, Kechot bin Mohamed) for a valuable consideration has been granted by an order of the Johor Bahru High Court dated 24 October 2013 under Originating Summons No. 24NCVC-271-10-2013, before Yang Arif Tuan Gunalan a/l Muniandy ("YA Gunalan").

[22] Thus, the third defendant contended that the said YA Gunalan's order dated 24 October 2013 remains valid, lawful and binding on all the relevant parties since there is no appeal against the said order.

[23] Hence, the third defendant contended that the plaintiffs herein do not have any *locus standi* to file or maintain their suit or to claim against the third defendant who is the lawful registered proprietor of the said land and free from encumbrances.

The Trial

[24] Learned counsel for the plaintiffs indicated to me on the outset of the hearing that the suit against the fourth and fifth defendants who were the directors of the third defendant had been withdrawn by way of a notice of discontinuance dated 29 June 2017. Thus, this trial is only between the plaintiffs and the first, second and third defendants.

[25] During the trial, the plaintiffs had called seven witnesses who all gave sworn testimonies as follows:

(i) PW1: Puan Noor Fareena binti Salleh, Penolong Pengarah, Bahagian Operasi, Jabatan Pendaftaran Negara ("JPN"), Bahagian Kelahiran, Kematian dan Anak Angkat, Kuala Lumpur. (subpoena witness)

(ii) PW2: Sulaiman bin Ahmad (No. K/P: 640409-10-6923) (first plaintiff)

(iii) PW3: Puan Nooraliza binti Ayob, Penolong Pegawai Tadbir, Bahagian Pendaftaran Hakmilik, Pejabat Tanah Johor Bahru (subpoena witness)

(iv) PW4: Puan Rokiah binti Abu, (No: K/P: 610625-10-5530)

(v) PW5: Mohamad Fadli bin Baharuddin, Penolong Pegawai Pendaftaran, Bahagian Kad Pengenalan JPN, Kuala Lumpur (subpoena witness)

(vi) PW6: Mohd Said bin Mohd Yasin, No. K/P: 380923-01-5639 (plaintiff No. 13)

(vii) PW7: Jemain bin Mohamed, No. K/P: 420916-01-5159 (subpoena witness – first defendant)

[26] For the third defendant, two witnesses testified namely:

(i) DW1: Wong Wee Yuen (lawyer)

(ii) DW2: Wang Hai (subpoena witness)

[27] The first defendant did not call any witness during the trial but he gave evidence as subpoena witness (PW7) for the plaintiff. The second defendant was absent throughout the trial.

Issues To Be Tried

[28] The issues to be tried in this case are as follows:

(i) whether LA is required for the plaintiffs to seek declaratory and consequential reliefs as prayed for in this suit;

(ii) whether the title acquired and now registered in the third defendant's name under the said land can be defeated under s. 340(2)(a), (b) or (c) of the NLC on account of fraud, forgery or void instrument;

(iii) whether the *ex parte* High Court order dated 24 October 2013 as regards the sale of Kechot bin Mohamed half share can be set aside by this court;

(iv) whether or not the first defendant is a registered owner of half share in the said land; and

(v) whether the third defendant is a *bona fide* purchaser for value without notice under proviso contained in s. 340(3) of the NLC.

Decision Of The Court

[29] Having fully considered the plaintiffs' as well as the defendants' case and the issues raised in the written submissions, I decided to allow the claim by the plaintiffs as set out in paras. 29(a), (b), (c), (d), (e), (f) and (h) of the statement of claim with cost of RM40,000 to be paid by the third defendant to the plaintiffs subject to payment of an allocator fee of 4%. This is my judgment setting out the full reasons for my decision.

Whether LA Is Required For The Plaintiffs To Seek Declaratory And Consequential Reliefs As Prayed For In This Suit

[30] It is the third defendant's contentions that without the LA, the plaintiffs had no *locus standi* to sue and the plaintiffs' action in court should be dismissed with costs. In support of this contention, reference was made to the decisions of *Dato' Ramesh Rajaratnam v. Datin Zaleha Abd Rahman & Ors* [2014] 5 CLJ 669; [2014] 6 MLJ 651; *Jumaaton Awang & Satu Lagi lwn. Raja Hizaruddin Nong Chik* [2004] 1 CLJ (Sya) 100; [1998] 6 MLJ 556; *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 4 CLJ 393; [1997] 1 MLRA 566; [1997] 3 MLJ 188 and *Deraman & Ors v. Mek Yam* [1976] 1 LNS 20; [1977] 1 MLJ 52.

[31] It is also the third defendant's contention that the plaintiffs had failed to prove the death of the deceased Jemain bin Mohamed when the plaintiffs had failed to produce the death certificate of the deceased and the LA of the estate of the deceased.

[32] Hence, the third defendant submitted that without proving the death of the deceased and without the LA, the plaintiffs have no *locus standi* to sue and the plaintiffs also have no interest in the estate of the deceased.

[33] The third defendant further referred to the Federal Court case of *Al Rashidy Kassim & Ors v. Rosman Roslan* [2007] 3 CLJ 361; [2007] 4 MLJ 297 and submitted that the plaintiffs wholly failed to discharge their burden to prove special circumstances.

[34] In response to the third defendant's contention, the plaintiffs submitted that the issue of *locus standi* is a non-issue as the same issue was raised in the third defendant's application to strike out the plaintiff's present suit (second suit) and was dismissed by this court.

[35] The plaintiffs further submitted that there is special circumstances existed in this case as held in the Federal Court case of *Al Rashidy* (*supra*).

[36] The plaintiffs, as beneficiaries based on the 'sijil *faraid*' further contended that they are not claiming a share or any proprietary interest in the assets of the estate of their deceased grandfathers nor seeking to name themselves on the title at this stage but only seeking a declaratory relief on the status of transfer on grounds of fraud/forgery/void instrument and more importantly for a protection/preservation order by way of a re-transfer to their original owners ie, to their grandfathers and not to themselves and therefore they have the *locus standi* to commence this action as an exception to the general principle apart from the clear COA decision granted in 2016.

[37] The plaintiffs made reference to the decisions of *Al Rashidy*; *Ooi Jim & Anor v. Ai Eit & Ors* [1974] 1 LNS 108; [1977] 2 MLJ 105; *Hj Ali Omar & Anor v. Lim Kian Lee & Ors* [2002] 8 CLJ 443; *Ng Thau Shing v. George Justine & Other Cases* [2005] 6 CLJ 80; *Mohd Salim Said & Ors v. Tang Pheng Kee & Anor And Another Appeal* [2014] 6 CLJ 485; [2014] 3 MLJ 504 and *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189.

[38] It is my considered view that in considering the above issue, this court cannot simply ignore the COA decision (see para. 8 above).

[39] The said COA decision is a unanimous decision which overrides and reviewed the first civil suit decision decided on 9 December 2015. What is more interesting to note that the said COA decision is not only a unanimous decision, but the terms of the order was also consented to and approved by the third defendant.

[40] Hence, it is my view that the third defendant cannot now resile from the terms of the COA decision without appealing or setting aside the said COA decision. In my view, the third defendant is now bound by the COA decision.

[41] After perusing the said COA decision, I find that the terms of the said COA decision are precise, clear and unambiguous. The said COA decision allows the filling of this current suit (second suit) in respect of both the deceased estates namely Jemain bin Mohamed and Kechot bin Mohamed upon obtaining the 'sijil *faraid*' from the Syariah Court.

[42] Since it involves a Muslim estate, I am of the view that the 'sijil *faraid*' is the best evidence and clothes the plaintiffs as beneficiaries with the legal capacity to bring this current suit (second suit).

[43] The said 'sijil *faraid*' clearly states the names of the deceased, their time of death, the rightful beneficiaries and their entitlements. Hence, neither this court nor the third defendant can question the legal effect of the said 'sijil *faraid*' since it involves Islamic law issue which is within the exclusive jurisdiction of the Syariah Court.

[44] The Court of Appeal in *Mohd Salim Said & Ors v. Tang Pheng Kee & Anor And Another Appeal* [2014] 6 CLJ 485; [2014] 3 MLJ 504 at p. 505 (MLJ) held that:

> [1] The determination of who were the beneficiaries of the deceased persons in the instant case was an Islamic law issue within the Syariah Courts's jurisdiction. The *faraid* certificates stated the names of the deceased, their time of death, the beneficiaries and their entitlement. In addition to testifying that they were the beneficiaries under Sahid's, Mah's and Yam's estate, the appellants had produced the death certificates of Mah and Yam and the *faraid* certificates issued by the Syariah Court in respect of Sahid and Mah. The certificates were the best evidence in proving the appellants were the rightful beneficiaries of the deceased. The Syariah Court order should have been accepted by the High Court (see paras 23-25).

[45] Upon perusal of the statement of claim, it is clear that the nature of the claim is based on an allegation of fraud/forgery relating to the transfer of the said land belonging to their grandfathers to the third defendant company. It is also clear that the nature of the claim is formulated for a preservation order to protect the beneficiaries, interest in the said land belonging to their grandfathers from being sold by the third defendant to subsequent purchaser and to prevent the loss of the said land and the irreparable damage arising thereof.

[46] I also find that the plaintiffs' statement of claim clearly shows that they are not seeking a distribution of their share in the said land or to be named on the title but rather to reinstate the names of their grandfathers being the original proprietors of the said land.

[47] The plaintiffs relied heavily on the Federal Court case of *Al Rashidy* where it was held at p. 298 (MLJ) as follows:

> (3) The suit sought a declaration that the respondent had obtained the title of the land through fraud. The question that the court ought to ask itself was whether the appellants had *locus standi* to institute an action seeking such declaratory relief. The action sought to regain land from a party who had by fraudulent means transferred the land to himself. The respondent had also entered upon the land and damaged the property. If the land is sold to a third party the

land may be lost forever. The appellants had to act fast in order to protect and preserve the estate of the deceased. Thus there existed special circumstances for the plaintiffs *qua* beneficiaries to commence a legal action against the respondent for the purpose of protecting and preserving the assets of the estate.

(4) The beneficiaries in the present case had at least an equity in the estate of the deceased to entitle them to seek a declaratory judgment. The appellants had the *locus standi* to commence this action at least for the limited purpose of protecting and preserving the asset of the estate. An order that the land be re-transferred to the deceased would serve this purpose. However, *qua* beneficiaries, the appellants would not be entitled to a claim for damages.

[48] It is my view that the cases referred by the third defendant can be distinguished and/or not directly relevant to this present case as the plaintiffs in those cases were claiming their proprietary interests in the estate. However, in this instant case, I find that the plaintiffs are seeking a similar protection order as granted in *Al-Rashidy*'s case ie, a protection/preservation order by way of a re-transfer of the said land to the original registered owners and a declaration on the status of transfer of the said land on the grounds of fraud/forgery and/or void instrument. In fact, the plaintiffs' case is on a stronger footing than in the case of *Al-Rashidy* in the light of the COA decision and 'sijil *faraid*'.

[49] Further, this court also finds that the issues of lack of *locus standi* due to the absence of LA as raised by the third defendant has been decided by this court. Therefore, the issue of *locus standi* on account of absence of LA to my mind cannot be raised or re-opened again since it has been decided upon in favour of the plaintiffs and affirmed by the Court of Appeal and the leave to appeal to Federal Court has been rejected.

[50] For all the reasons given, it is my view that the plaintiffs have the *locus standi* to commence this current suit to protect and preserve the beneficiaries' interest in the said land.

Whether The Title Acquired And Now Registered In The Third Defendant's Name Under The Said Land Can Be Defeated Under s. 340(2)(a), (b) or (c) Of The NLC On Account Of Fraud, Forgery Or Void Instrument

[51] It is the third defendant's contention that the third defendant is the registered proprietor of the said land and upon registration of the said land as proprietor, the third defendant had acquired indefeasibility of title under s. 340(1) of the NLC

[52] The third defendant had denied the allegations of fraud, forgery and/or void instrument in the process of sale and purchase of the said land.

[53] In the alternative, the third defendant claimed to be the "*bona fide* purchaser for value without notice" as the purchase price of the said land have been paid to the vendor solicitors ie, second defendant and that there are no encumbrances.

[54] Section 340 of the NLC is a section which confers indefeasibility of title or interest on a *bona fide* purchaser for valuable consideration. Though it is true that once the title is registered, the title becomes indefeasible. However, there are very clear exceptions provided for under the NLC.

[55] Section 340 of the NLC reads as follows:

340. Registration to confer indefeasible title or interest, except in certain circumstances

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):-

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested.

Provided that nothing in this sub-section shall effect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

[56] From the above provision, it is clear that the indefeasibility of title does not apply as a result of at least one of the three vitiating factors laid out in s. 340(2)(a), (b), or (c) of the NLC. Thus, the title can be defeated due to fraud or misrepresentation as stated under s. 340(2)(a) or where the registration is obtained under s. 340(2)(b) of the NLC by forgery, or by means of an insufficient or void instrument or under s. 340(2)(c) if the title or interest was unlawfully acquired.

[57] Hence, the burden is on the plaintiffs to prove on the balance of probabilities that the third defendant's title is defeasible and the title is not conclusive under s. 89 of the NLC.

[58] The Federal Court in the case of *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] MLJU 292 held:

> [52] we therefore reiterate that we agree and accept the rationale in *In re B (children) (supra)* **that in civil claim even when fraud is alleged the civil standard of proof, that is on the balance of probabilities, should apply.** And perhaps it is not out of place here to restate the general rule at common law that, "in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities. (emphasis added)

[59] From the evidence produced in court, I am of the view that the third defendant is not the first registered owner of the said land but the first immediate purchaser of the said land. I am also of the view that the third defendant had acquired the title through fraud, and/or by forgery of the first and second defendants and/or by means of a void instrument of transfer on the grounds of forgery. The basis of my findings can be seen from the evidence that the deceased who were the original registered owner of the said land could not have executed the sale and purchase agreement dated 1 October 2013 and the instrument of transfer (Form 14A) dated 1 October 2013 nor could they have applied for an order for sale of Kechot's share in October 2013 as they were long dead before the year 2013.

[60] Furthermore, my findings can be supported by referring to the first defendant's statement of defence in paras. 3, 4, 6, 7 and 8 at p. 30 of ikatan pliding (IP) where the first defendant had not only admitted that he is not the original registered owner of the said land, but he also admitted the plaintiff's statement of claim in regards to the particulars of fraud and forgery relating to him in executing the sale and purchase agreement dated 1 October 2013 as well as the instrument of transfer (Form 14A) dated 1 October 2013 as co-vendor without the lawful authority to do so.

[61] The first defendant in his statement of defence at paras. 3, 4, 6, 7 and 8 at p. 30 of ikatan pliding (IP) has stated the following:

> 3. Pernyataan dalam perenggan 11, 12 dan 13 pernyataan tuntutan Plaintif-Plaintif tidak dinafikan tetapi *Defendan Pertama* ingin mengatakan *bahawa namanya dipergunakan oleh pihak-pihak tertentu termasuk Defendan Kedua kerana namanya menyerupai nama simati datuknya yang mana sebenarnya merupakan pemilik berdaftar ½ bahagian "hartanah tersebut" sejak tahun 1927 dan baki ½ bahagian lagi oleh abangnya simati bernama Kechot bin Mohamed.*
>
> 4. *Defendan Pertama seterusnya mengatakan bahawa Zabidah binti Sembob yang dirujuk dan yang merupakan pentadbir serta pemegang amanah harta pusaka suaminya simati Kechot bin Mohamed juga telah meninggal dunia pada tahun 1968 dan tidak mungkin dapat tandatangani mana-mana dokumen dalam tahun 2013 atau 2014.*
>
> 6. *Defendan Pertama mengakui* pernyataan dalam perenggan 19 penyataan tuntutan Plaintif-Plaintif serta ingin mengatakan bahawa ia *bukanlah pemilik berdaftar mana-mana bahagian "hartanah tersebut".*
>
> 7. *Perenggan 20, 21 dan 22 pernyataan tuntutan Plaintif-Plaintif serta butir-butir fraud dalam perenggan 22 terhadapnya tidak dinafikan tetapi Defendan Pertama mengatakan bahawa ia dipergunakan dan diperdayai oleh pihak-pihak tertentu termasuk Defendan Kedua dengan representasi Defendan Pertama berhak menerima balasan bahagiannya untuk hartanah tersebut sebagai salah seorang waris hartanah tersebut.*
>
> 8. *Defendan Pertama mengakui* perenggan 23, 24, 25, 26, 27, 28 dan 29 penyataan tuntutan Plaintif-Plaintif serta mengatakan bahawa ia *sebagai salah seorang waris simati datuknya telah dipergunakan oleh pihak tertentu dan satu laporan polis telah dibuat olehnya.* (emphasis added)

[62] Moreover, reference was made to the first defendant's witness statement where he admitted that he had affirmed the additional affidavit ("afidavit tambahan") by fraudulently representing himself as the registered owner of the said land without the authority to do so even though he knew at that time that the registered owner of the said land was his grandfather who carried the same name as his, namely Jemain bin Mohamed. The first defendant also admitted that he had fraudulently affirmed the said affidavit to support the application for sale of the Kechot bin Mohamed's remaining half share (Kechot's share) applied by Zabidah binti Sembob whom the first defendant also admitted to be long dead at the time of the application for order for sale and execution of sale/transfer documents of the said land.

[63] The first defendant (PW7) gave testimony in court not on behalf of his case but instead as one of the witness subpoenaed by the plaintiffs to testify in court since his solicitor had indicated before the trial that they do not propose to call him to testify during the defence stage.

[64] The first defendant (PW7) in his witness statement (PWS7) has testified as follows:

4. S: Boleh beritahu kenapa anda dituntut sebagai salah satu pihak?

J: *Saya pernah tandatangani Perjanjian Jual Beli dan Borang pindah milik masing-masing bertarikh 1.10.2013 sebagai salah satu pihak penjual tanah setengah bahagian kepunyaan datuk saya Jemain bin Mohamed walaupun saya bukan pemilik berdaftar tuan punya tanah yang dipertikaikan dalam kes ini* dan tanpa kebenaran waris-waris lain.

5. S: Rujuk muka surat 102-118 Ikatan Dokumen. Adakah ini Perjanjian jual beli yang ditandatangani oleh anda sebagai salah satu pihak penjual. Rujuk terutamanya muka surat 117. Adakah ini tandatangan anda di sebelah nama Jemain bin Mohamed dengan nombor kad pengenalan: 420916-01-5159.

J: Benar itu adalah tandatangan saya dan nombor kad pengenalan kepunyaan saya.

6. S: Dalam muka surat 117 juga terdapat tandatangan seorang lagi bernama Zabidah binti Sembob. Pernahkah anda hadir bersamanya semasa orang ini menandatangani namanya?

J: Tidak kerana setahu *saya Zabidah binti Sembob nenek moyang saya serta isteri kepada datuk saya telah meninggal dunia dalam tahun lebih kurang tahun 1968 dan dia tidak mungkin dapat tandatangani dokumen jual beli.*

10. S: Seterusnya di muka surat 120 terdapat nama anda bersama catatan nombor kad pengenalan anda dan nama Zabidah binti Sembob dengan catatan nombor kad pengenalan. Soalan jika ia telah meninggal dunia pada 1968 bagaimana pula tandatangannya boleh diturunkan. Sila terangkan.

J: Setahu saya dia Zabidah binti Sembob sudah lama meninggal dunia dan apabila saya dapat tahu pada pertengahan 2014 bahawa terdapat penipuan dalam kes ini saya telah membuat laporan polis seperti dalam muka surat 94-95 Ikatan Dokumen.

11. S: *Nama datuk anda dan nama anda sebagai Defendan Pertama nampaknya sama, betulkah ini?*

J: *Ya, saya setuju nama datuk saya dan nama saya adalah serupa tetapi saya miliki kad pengenalan dan nombor kad pengenalan.*

12. S: Apa perbezaannya disamping nama yang sama dengan datuk anda?

J: *Datuk saya bernama Jemain bin Mohamed sudahpun meninggal dunia lama iaitu setahu saya dalam tahun 1958 di Johor Bahru* dan semasa itu umur saya lebih kurang 16 tahun dan saya rapat dengannya masa itu tetapi datuk saya merupakan pemilik sebenar setengah bahagian tanah tersebut dan bukan saya dan *datuk saya tidak ada kad pengenalan setahu saya dan tiada rekod di Jabatan Pendaftaran Negara.*

13. S: *Jika anda bukan Pemilik Berdaftar sebenar tanah yang dipertikaikan dalam tindakan ini mengapa anda menandatangani perjanjian jual beli dan Borang pindah milik, bukankah ini satu pemalsuan tandatangan datuk anda serta satu frod terhadap waris-waris lain?*

J: *Saya mengakui tetapi saya telah digunakan oleh pihak tertentu iaitu menantu kepada adik saya yang katakan saya berhak jual sebagai salah satu waris dan peguam pula suruh saya tandatangani dokumen saya pun turut ikut.* Tetapi kemudiannya saya tanya saudara mara yang lain sama ada mereka terima bahagian mereka dan jawapan adalah tidak serta reaksi terkejut dan marah kerana mereka pun tidak selama-lama ini menyedari datuk kami mempunyai tanah.

22. S: Rujuk muka surat 123-126 iaitu Saman Pemula Ex-Parte. Pemohon di sini untuk perintah jualan bahagian Kechot bin Mohamed pemilik baki setengah bahagian dalam tanah berkenaan. Nama Pemohon Zabidah binti Sembob. Soalan, "*Jika Zabidah ini sudah meninggal dunia macam mana pula ia boleh jadi pemohon dan dapat failkan affidavit sokongan lihat muka surat 127? Boleh anda terangkan.*

J: *Itu adalah satu penipuan dan pemalsuan dan siasatan JPN juga mengesahkan bahawa nombor kad pengenalan kepunyaan seorang lain.*

23. S: *Kenapa pula anda menyokong permohonan Saman Pemula tersebut. Rujuk muka surat 153-154*? Afidavit Tambahan anda?

J: Seperti saya kata dahulu *terdapat penipuan dan setahu saya peguam telah sediakan Afidavit dan saya sign bila disuruh.*

24. S: *Kenapa anda kini mengakui tentang pemalsuan tandatangan datuk anda* dalam menurunkan tandatangan anda *dalam Borang pindah milik bertarikh 1.10.2013* seolah-olah anda yang merupakan pemilik berdaftar tanah berkenaan untuk setengah bahagian *sedangkan bukan anda tetapi datuk anda yang sama nama dengan anda adalah tuan punya pemilik berdaftar tanah yang sebenar?*

J: *Saya memang menyesal berbuat demikian dan saya dipergunakan.*

25. S: *Rujuk muka surat 65-68 Ikatan Dokumen. Soalan nama Jemain bin Mohamed yang terkandung dalam Geran hakmilik ini adakah ia merujuk kepada anda?*

J: *Bukan merujuk kepada saya tetapi kepada datuk saya yang mempunyai nama yang sama dengan saya tetapi beliau tiada rekod nombor kad pengenalan.* (emphasis added)

[65] During cross-examination, the first defendant (PW7) admitted that he had affirmed the afidavit tambahan at p. 153 of ikatan dokumen bersama A before a Commissioner for Oaths and had fraudulently represented himself as the registered owner of the said land. He also admitted that in the said afidavit tambahan, he had mentioned that he had no objection to the sale of the Kechot's share applied by Zabidah binti Sembob (see notes of evidence dated 25 February 2019 at pp. 87 to 88):

WKF: Tapi ikut dokumen ini, awak dah sign lah, di depan Commissioner for Oaths. Ada tak? Saya kata awak sudah sign dokumen ini dengan sukarela di depan Commissioner for Oaths.

YA: Setuju tak, pakcik? En. Jemain kan peguam kata, Tanya ada dokumen di muka surat 153 dengan 154, kan? En. Jemain dah tengok depan En. Jemain, kan? Ok. Sekarang ni, peguam kata oleh kerana ni afidavit ni kata En. Jemain bin Mohamed telah tandatangan depan Pesuruhjaya Sumpah, maka peguam mengatakan yang En. Jemain telah tandatangan akuan sumpah ini depan Pesuruhjaya Sumpah. Setuju ke tidak?

Jemain: Setujulah.

WKF: Jadi awak dah sumpah ini sebagai tuan punyalah. Dah setuju ya. Ok, ini sesalinan catatan carian persendirian JM1. Tengok 156. Muka surat 156. Ini exhibit, exhibit En. Jemain. Awak kata ini carian rasmi. Carian persendirian. Tengok page 156. Pemilikan dan alamat. Satu Jemain bin Mohamed.

Jemain: Ya.

WKF: Jadi itu, awak punya namalah.

Jemain: Ya.

WKF: Yang kedua itu, Zabidah binti Sembob, sebagai pemegang amanah. Betul tak? Ikut catatannya.

Jemain: Ya.

WKF: Jadi, setengah bahagian ini didaftar dalam nama Zabidah. Betul? Tengok ini. Sebagai pemegang amanah. Ok? Jadi, perenggan 3, 'Saya sebagai pemegang setengah bahagian atas kepentingan tanah tersebut bersetuju dan tiada halangan atas hasrat pemegang amanah untuk menjual kesemua bahagian tanah ini kepada Teguh Asiamas'. Awak setuju dengan sumpah itu ke tak? Teguh Asiamas, itu Pembeli lah, tanah.

YA: Ok, you're referring to which page? Muka surat berape?

WKF: 154, 154.

YA: 154 ya, buka 154.

WKF: 145, tengok baik-baik. 154, perenggan 3.

Jemain: Perenggan 3.

WKF: Betul?

Jemain: Betul.

[66] During cross-examination, the first defendant also admitted that this present matter involved issue of money and not fraud as the second defendant who was also his lawyer did not pay him the money from the sale of the said land even though he had affirmed the said afidavit tambahan. (see notes of evidence dated 25 February 2019 at p. 100):

> YA: Ok. Jadi, setuju ke tidak dengan cadangan peguam tu? Yang ini bukan satu kes penipuan tapi banyak kerana waris-waris dan En. Jemain tak dapat bahagian masing-masing. Jadi bukan penipuan. Itu cadangan peguam tu. En. Jemain setuju ke tidak?
>
> Jemain: Setujulah.

[67] However, in re-examination, the first defendant (PW7) maintained the position taken in examination-in-chief that he is not the real registered owner of the said land and admitted that there was forgery in executing the sale/transfer of documents.

[68] Having perused the statement of defence of the first defendant, I find that there is a clear judicial admission by him that he is not the real registered owner of the said land and has admitted to the particulars of fraud and forgery in executing the sale and purchase agreement and the instrument of transfer both dated 1 October 2013 as co-vendor without the lawful authority to do so. To me, an admission in the first defendant's pleadings can be treated as a highest form of admission.

[69] I find support in this context by referring to the Federal Court decision of *Yam Kong Seng & Anor v. Yee Weng Kai* [2014] 6 CLJ 285; [2014] 4 MLJ 478, through the speaking judgment of Suriyadi Halim Omar FCJ (as he then was) where it was held:

> [16] The above averment was in response to para 12 of the statement of claim wherein the appellants averred that the company and the respondent had confirmed in writing of the amount owing and payable to them. *It is trite law that a judicial admission made in a pleading stands on a higher footing than evidentiary admission (Sarkar's Law of Evidence) with the respondent's admission therein be made the foundation of the rights of the parties (Satish Mohan Bindal v. State of UP AIR 1986 All 126, at p 128: 1985 All CJ 507). Any failure on the part of the respondent to rebut the admission to avoid the legal consequences of his admission would entitle the appellants to enter judgment against him.*
>
> [17] *Having perused the defence in particular para 8, we find that there is clear judicial admission of the debt owed.* The question that must follow would be whether the respondent was avoiding responsibility to pay up. In *Jacob and Goldrein's Pleadings: Principles and Practice* [1990] pp 133-134 in dealing with confession and avoidance, the following is stated:

Confession and Avoidance Meaning

The term 'confession and avoidance' is the description of a plea in the defence which, while expressly or impliedly admitting or confessing or assuming the truth of the material facts alleged in the statement of claim, seeks at the same time to avoid or destroy the legal consequences of those facts. The plea is invoked by alleging fresh or additional facts to establish some legal justification or excuse, or some other ground for avoiding or escaping legal liability. The defendant, as it were, confesses the truth of what is alleged against him but proceed immediately to 'avoid' the effect of such allegations.

[18] Having scrutinised the defence we find that the respondent has failed to avoid legal liability. *With there being judicial admission by the respondent sufficient to hold him liable to the amount claimed* the answer to the first question of law in this appeal must be answered in the positive. (emphasis added)

[70] I am also of the considered view that the first defendant (PW7) should not be allowed to blow hot and cold in his testimony in court. He is bound by his pleadings. In the case of *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1, the Federal Court held:

[29] It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded.

[71] Further, the Court of Appeal in *Raub Australian Gold Mining Sdn Bhd v. MKini Dotcom Sdn Bhd & Ors* [2018] 1 LNS 62 held:

[66] … *The fact that it is not within the contemplation of the parties is unfair and prejudicial to the party against whom such a defence is levelled. This is the underlying reason why parties are bound to their pleaded case.*

[67] In the case of *RHB Bank Bhd v. Kwan Chew Holdings* [2010] 1 CLJ 665, the Federal Court similarly criticized the Court of Appeal for dealing with the appeal on an unpleaded issue, finding that the proposition of the Court of Appeal was not even pleaded by the respondent and *that parties must abide by their pleadings and it is not the duty of the Court to invent or create a cause of action or a defence under the guise of doing justice for the parties.* (emphasis added)

(see *Ketua Pengarah Jabatan Kerja Raya v. Strongkota Development Sdn Bhd & Another Appeal* [2016] 3 CLJ 741; [2016] 6 MLJ 512; and *Poraviappan Arunasalam Pillay (Sebagai Pentadbir Harta Pesaka Nadarajah Sithambaram Pillai) v. Periasamy Sithambaram Pillai & Anor* [2015] 6 CLJ 857; [2015] 4 MLJ 285).

[72] It is my view that the acquisition of the said land and the registration of the transfer in the third defendant's name arose out of a void instrument of transfer (Form 14A) due to the forgery. I find support in my view by referring to the sale/transfer documents executed by the first defendant who is not the real registered owner in respect to the deceased Jemain's share and likewise by another person executing the documents and pretending to be the trustee for Kechot's share, the purported Zabidah binti Sembob. Thus, based on the testimony, contemporaneous documents available and the inherent probabilities, the said land registered in the third defendant's name is clearly defeasible and liable to be set aside under s. 340(2)(b) of the NLC for fraud and/or forgery and/or void instrument.

[73] Teo Keang Sood and Khaw Lake Tee in their book *Land Law in Malaysia, Cases and Commentary* had stated that in the absence of any of the vitiating factors laid down in s. 340(2) of the NLC, a title once registered is indefeasible.

[74] At pp. 168 and 169 of the said book, it is stated as follows:

> **(c) Misrepresentation – Section 340(2)(a)**
>
> Apart from fraud, section 340(2)(a) also provides that a registered title or interest may be set aside on the ground of misrepresentation to which the person or body is a party or privy. 'Misrepresentation' here would appear to be 'fraudulent misrepresentation' and is a species of fraud.
>
> **(d) Forgery – Section 340(2)(b)**
>
> Where registration is obtained by forgery, the registered title or interest of that person or body who is a party or privy to the forgery may be defeasible by reason of fraud under section 340(2)(a) or forgery under section 340(2)(b). The latter paragraph is, however, not restricted to cases of forgery involving fraud on the part of the person or body who has obtained registration; it would appear to apply even where that person or body is a purchaser in good faith and for value. The position as regards the effect of registration obtained by way of forgery under the National Land Code 1965 may be contrasted with that of other Torrens jurisdictions. In those jurisdictions, in the absence of fraud, registration of a forged or void instrument confers an indefeasible title or interest. This is what is commonly referred to as immediate indefeasibility as opposed to deferred indefeasibility where, as under the Code, even in the absence of fraud, registration of a forged or void instrument will not confer indefeasibility.

[75] In the case of *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1 the Federal Court in construing s. 340 of the NLC and its subsection and proviso went on to state that in the case of an 'immediate purchaser' whose name appears as the next person on the title and if it can be shown that it was acquired through fraud (s. 340(2)(a)) or by forgery

(s. 340(2)(b)) or by means of an insufficient or void instrument the title can be set aside. In the case of forgery, insufficient or void instrument as in this case there is no need to show that the third defendant was a party or privy to such instances.

[76] Based on the above reasons, I am of the view that the title acquired and now registered in the third defendant's name under the said land can be defeated under s. 340(2)(b) of the NLC for forgery and/ or void instrument.

Whether The Ex-parte High Court Order Dated 24 October 2013 In Regards To The Sale Of Kechot bin Mohamed Half Share Can Be Set Aside By This Court

[77] The plaintiffs questioned the validity of the High Court order dated 24 October 2013 on the ground of forgery. The third defendant in response submitted that the High Court order dated 24 October 2013 obtained by Zabidah binti Sembob sanctioning the sale of her half share in the said land for valuable consideration is valid and final until set aside by an appellate court.

[78] The third defendant further submitted that the law is clear that the order cannot be set aside in the action herein as decided in the case of *Pilecon Engineering Bhd v. Malayan Banking Bhd & Ors* [2012] 1 LNS 1492; [2012] 3 MLJ 100. To set aside the order dated 24 October 2013 (pp. 159 to 160 of ikatan dokumen bersama A), the plaintiffs must file an action or application in the same proceedings, ie, Saman Pemula No. 24NCVC-271-10-2013 in the Johor Bahru High Court. This point of law was held in the Federal Court case of *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393.

[79] In this present matter, it is not disputed that there is no JPN records for the name of Zabidah binti Sembob and this has been confirmed by the testimonies of JPN witnesses ie, Puan Noor Fareena Salleh (PW1) and Mohamed Fadli Baharuddin (PW5). (See pp. 77 to 84 of the ikatan dokumen bersama A)

[80] The JPN records also show that NRIC No. 331231-01-8918 furnished at the request of a solicitor and used for the sale and/or transfer documents (see pp. 80 and 81 of the ikatan dokumen bersama A) does not refer to Zabidah binti Sembob but to a dead person namely Zainon binti Ibrahim (see salinan sah daftar kematian dated 25 February 2013) and this NRIC number had been used in obtaining the court order for sale dated 24 October 2013 as well as in the sale and transfer of documents when the applicant for order for sale Zabidah binti Sembob is also believed to be dead at the material time.

[81] Further, this court finds that the plaintiffs have succeeded in proving that the *ex parte* order was obtained through fraud and/ or forgery by the first and second defendants. The court based its findings on the testimony of the first defendant, his admission in his pleadings (statement of defence), contemporaneous documents and police report tendered in court.

[82] I am also of the view that the third defendant need not be a party or privy to the forgery where forgery exists.

[83] Reference has been made to the first defendant's testimony when he admitted that he had affirmed the afidavit tambahan and made false statement mentioning that he is the registered owner of the said land. He further testified that he had signed the said affidavit on the instructions of his previous lawyer who is the second defendant named in this suit.

[84] Moreover, the first defendant had also admitted that he had signed the memorandum of transfer to transfer the said land even though he has no authority to do so as he is not the registered owner of the said land. He also admitted that the original owner of the said land was his grandfather who accidentally carried the same name as his (see paras. 67, 68, 69 and 70 above and pp. 109 to 114 and 116 to 119 of the notes of evidence dated 25 February 2019).

[85] Further, En Sulaiman bin Ahmad (PW2) (first plaintiff) and En Mohd Said bin Mohd Yasin (PW6) (plaintiff No. 13) in their testimonies in court had stated that the real registered owner and/or vendor Jemain bin Mohamed and Zabidah binti Sembob as trustee and/or co-vendor for Kechot's remaining share had died and could not possibly have signed the sale and/or transfer of documents. (see PWS2 and notes of evidence dated 24 February 2019 pp. 30 to 96 and 132 to 148 and PWS6 and notes of evidence dated 25 February 2019 pp. 46 to 77).

[86] Based on the above reasons, this court finds that the *ex parte* order is a nullity *ab initio* and must be set aside as it was fraudulently obtained by the first and second defendant for the trickster applicant pretending to be the real Zabidah binti Sembob. Therefore, I am of the view that as the registration of the title favouring the third defendant in respect of Kechot's share was based on a defective order, the title is defeasible.

[87] I find that the order given by YA Gunalan dated 24 October 2014 was an *ex parte* order made in the absence of the plaintiffs. The plaintiffs were not aware or made aware of the proceedings for order for sale and neither were they parties to the proceedings. Therefore, it is absurd for the third defendant to contend that the plaintiffs should intervened and/or appealed against YA Gunalan's order.

[88] It is my view that the plaintiffs can challenge the *ex parte* order in this fresh action. I find support in this context in the Federal Court decision of *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143 where it was held:

> Clearly the Court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in O. 28 r. 11 Rules of the Supreme Court 1957 (O. 20 r. 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the Court: *Re St. Nazaire Co.* 12 Ch D 88, *Kelsey v. Doune* [1912] 2 KB 482; *Hession v. Jones* [1914] 2 KB 421, unless it is a judgment by default or made in the absence of a party at the trial or hearing. *But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: Hip Foong Hong v. Neotia & Co.* [1918] AC 888 and *Jonesco v. Beard* [1930] AC 298. The hearing of the action will in a proper case be expedited: *Smith v. Peizer* 65 SJ 607.
>
> For these reasons, we allowed the appeal with costs and restored the original order made in the foreclosure proceeding.
>
> *We have observed that the fresh action necessary to set aside the order on the ground of fraud has been commenced.* All that the respondent requires are a stay of the foreclosure proceeding and an expedition of the hearing of the fresh action. (emphasis added)

[89] Further, in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37 at 39 the Federal Court held that orders obtained in breaching natural justice are said to be nullities and can be successfully attacked even in collateral proceedings *ex debito justitiae.* At p. 39 (MLJ), Federal Court held:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, 736, Lord Diplock L.J. (now a Law Lord) said (at page 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

[90] The Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* (*supra*), through the speaking judgment of Mohd Azmi FCJ (as he then was) held:

A It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction. Apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction
B of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where
C the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

D **[91]** Reverting to the facts of this case, based on evidence produced in court, the court order has been wrongfully and illegally obtained using an identity card number belonging to a dead person and the real applicant for order for sale was dead and not living when all the sale and/or transfer and court application in 2013 was made.

E **[92]** Further, this court finds that the *ex parte* order was obtained through fraud and/or forgery in the absence of the plaintiffs.

[93] Thus, based on the authorities cited above, this court is of the view that it is seized with the inherent jurisdiction to set aside the *ex parte* order *ex debito justitiae.*

F **Whether Or Not The First Defendant Is The Registered Owner Of Half Share Of The Said Land**

[94] Based on the evidence presented before this court, I find that the first defendant is not the registered owner of half share of the said land. The basis of my findings can be evidenced by referring to the testimony of the first
G defendant (PW7) who happens to be the co-vendor in this case, his admission in his pleadings (statement of defence), testimonies of the JPN witnesses and contemporaneous documents have established that the signature of the deceased Jemain bin Mohamed and Zabidah binti Sembob who had passed away have been forged and the first defendant had admitted to the signing of
H his signature although he is not the registered owner but the grandson carrying similar name.

[95] This issue has been discussed at length at paras. 59 to 94 above.

I

Whether The Third Defendant Is A Bona Fide Purchaser For Value Without Notice Under Proviso Contained In s. 340(3) Of The NLC

[96] Based on the testimonies and contemporaneous documents tendered in court, I am of the considered view that even assuming that the third defendant is an innocent party, it cannot rely or invoke the doctrine of *bona fide* purchaser for value since the third defendant is the immediate purchaser and not the subsequent purchaser.

[97] I am also of the view that even if the third defendant is the subsequent purchaser, it still need to prove that it is a *bona fide* purchaser going by the proviso to s. 340(3) of the NLC and the Federal Court's case of *Tan Ying Hong* (*supra*) on the interpretation of s. 340 of the NLC and the proviso.

[98] *Tan Ying Hong*'s case clearly laid to rest the proper construction to the proviso to s. 340(3) of the NLC in that it only helps a subsequent purchaser and not the third defendant company here who is the 'immediate purchaser' and sub-s. 340(3) of the NLC does not apply to s. 340(2) and *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133; [2001] 1 MLJ 241 case was said to be decided wrongly in the interpretation of the proviso.

[99] In *Tan Ying Hong*'s case, the Federal Court held:

(1) (per Zaki Azmi Chief Justice Malaysia and Arifin Zakaria CJ (Malaya)) Section 340(1) of the NLC confers an immediate indefeasible title or interest in land upon registration, subject to the exceptions set out in s. 340(2) and (3). According to the *Adorna Properties*' case, Adorna Properties, the appellant, had acquired its title to the land through or under a forged instrument and it therefore came under the category of s. 340(2)(b). The court then held that such a title was insulated from impeachment by the proviso in s. 340(3) of the NLC. The question which arose was whether the proviso immediately after s. 340(3) applied to other provisions of s. 340, in particular, to s. 340(2)(b). This could only be deduced from the proviso itself. From the authorities it was clear that a proviso to a subsection would not apply to another subsection and that a proviso carved out an exception to the provision immediately preceding the proviso and to no other. As such the proviso immediately after s. 340(3) of the NLC is directed towards s. 340(3) alone and not to the earlier subsection. This is supported by the use of the words 'in this subsection' in the proviso. Therefore its application could not be projected into the sphere or ambit of any other provisions of s. 340 (see paras 6-10, 44-45 & 48-51).

(2) (per Zaki Azmi Chief Justice Malaysia and Arifin Zakaria CJ (Malaya)) Further, even though s. 340(3)(a) and (b) refer to the circumstances specified in s. 340(2) they are restricted to a subsequent transfer of an interest in the land. Therefore, a person or body in the position of Adorna Properties could not take

advantage of the proviso to s. 340(3) to avoid its title or interest from being impeached. It is trite law that this court may depart from its earlier decision if the former decision sought to be overruled was wrong, uncertain, unjust or outmoded or obsolete in the modern conditions. As it was clear that the Federal Court in the *Adorna Properties* case had misconstrued s. 340(1), (2) and (3) of the NLC and thus come to the erroneous conclusion that the proviso to s. 340(3) applied equally to s. 340(2), this error needed to be remedied forthwith in the interest of all registered proprietors (see paras 11, 52-53).

[100] Arifin Zakaria (CJ Malaya) (as he then was) in *Tan Ying Hong* went on to observe on the facts of that case that since the two charges registered in favour of the third respondent were based on void instruments as they were not executed by the appellants, it therefore followed that the two charges were liable to be set aside under s. 340(2)(b) and as the third respondent was an immediate holder of these charges it could not take advantage of the proviso to s. 340(3). Further, the fact that the third respondent acquired the interest in question in good faith for value was not in issue because the charges arose from void instruments.

[101] At pp. 294 to 296 (CLJ); pp. 21 and 22 (MLJ) of *Tan Ying Hong*'s case it was held as follows:

[55] Reverting to the facts of this case, it is not in dispute that *the two charges registered in favour of the third respondent were based on void instruments as the relevant Form 16A were not executed by the appellant.* They were executed by the first respondent pursuant to a forged PA. *Thus, the charge instruments (Form 16A) used in the present case were indisputably void instruments.* It follows, therefore, that the two charges in this case are *liable to be set aside under s. 340(2)(b) since they are based on void instruments.*

...

[56] The third respondent is an immediate holder of these charges. That being the position, the third respondent could not take advantage of the proviso to sub-s. (3) of s. 340.

[61] *We must stress that, the fact that the third respondent acquired the interest in question in good faith for value is not in issue, because once we are satisfied that the charges arose from void instruments, it automatically follows that they are liable to be set aside at the instance of the registered proprietor namely, the appellant.*

(emphasis added)

[102] In our present case, I am of the view that the same principles apply since the title registration arose out of a void instrument due to the forgery of rogue vendors the title can be set aside. Further, the 2013 *ex parte* court order was also fraudulently obtained and therefore can be set aside.

Conclusion

[103] For the above reasons, I find that the plaintiffs had proved on the balance of probabilities its case against the first, second and third defendants.

[104] Based on the above, I hereby allow the plaintiffs' claim as set out in paras. 29(a), (b), (c), (d), (e), (f) and (h) of the statement of claim with costs of RM40,000 to be paid by the third defendant to the plaintiffs subject to payment of the allocator fees.